September 8, 2017

Internal Revenue Service

CC:PA:LPD:PR (Notice 2017-38)

Room 5205

P.O. Box 7604, Ben Franklin Station, Washington, DC 20224

Re: Notice 2017-38 Comments on Regulations Regarding Allocation of Partnership Liability for Disguised Sales

Dear Sir or Madam:

The Master Limited Partnership Association ("MLPA") in response to the issuance of certain regulations addressing the allocation of partnership liabilities and the application of the partnership disguised sale regulations to contributions of property to a partnership, and in response to Notice 2017-38,[1] is pleased to submit the following comments.

The MLPA is the nation's only trade association representing MLPs.[2] For more than three decades, the association has represented the interests of MLPs in Washington, D.C. and the states. MLPs are an integral way our nation's private sector finances the infrastructure needed to fully utilize newly discovered domestic energy resources – leading to greater energy independence for the United States – and to ensure that a wide variety of energy products make

[1] 2017-30 I.R.B. 147.

[2] As used herein, the term "MLP" refers to a publicly traded partnership, as defined under section 7704, that is classified as a partnership.

their way efficiently and safely from the production fields to American homes, businesses and communities.

On October 5, 2016, the Internal Revenue Service ("IRS") and United States Department of Treasury ("Treasury") issued final, temporary, and proposed regulations under Code sections 707 and 752, relating to the disguised sales of property to or by a partnership and the allocation of partnership liabilities.[3] Generally speaking, the regulations make amendments to a notice of proposed rulemaking published on January 30, 2014 ("2014 Proposed Regulations"),[4] and include new rules not previously proposed. The 2014 Proposed Regulations provided certain rules intended to clarify and change the application of the disguised sale rules under §707 and the sharing of partnership liabilities under §752.

In response to Executive Order 13789,[5] the IRS and Treasury issued Notice 2017-38, which includes Treasury Decision 9788 among a list of regulations for which they have invited comments.

Summary of Recommendations

We recommend the withdrawal of the provision in the temporary regulations of T.D. 9788 (the "Temporary Regulations") (particularly, Reg. §1.707-5T(a)(2)(i))[6] that restricts a partner's share of partnership liabilities under the disguised sale rules to the percentage used to determine the partner's share of partnership profits under Reg. §1.752-1(a)(3) (not to "exceed the partner's share of the partnership liability under section 752 and applicable regulations (as limited in the

[3] T.D. 9787, 81 Fed. Reg. 69,291 (Oct. 5, 2016), as corrected by 81 Fed. Reg. 80,587 (Nov. 16, 2016); T.D. 9788, 81 Fed. Reg. 69,282 (Oct. 5, 2016), as corrected by 81 Fed. Reg. 80,993 (Nov. 17, 2016); REG-122855-15, 81 Fed. Reg. 69,301 (Oct. 5, 2016). Unless otherwise indicated, all references to the "Code" are to the Internal Revenue Code of 1986, as amended, and references to "Section" and "§" are to sections of the Code, and references to "Reg. §" are to sections of the Treasury regulations promulgated thereunder.

[4] REG-119305-11, 79 Fed. Reg. 4826 (Jan. 30, 2014).

[5] 82 Fed. Reg. 19317 (Apr. 21, 2017). The order instructed the Secretary of the Treasury to immediately review all significant tax regulations issued on or after January 1, 2016, and submit a report identifying regulations that (i) impose an undue financial burden on U.S. taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the IRS. Executive Order 13789, §2(a).

[6] Reg. §1.707-5T(a)(2)(i) applies to any transaction in which all transfers occur on or after January 3, 2017. The temporary regulation expires on October 4, 2019. *See* Reg. §1.707-9T(a)(5), (c).

application of section 1.752-3(a)(3) to this paragraph (a)(2))") (the "Proviso"). To the extent the IRS and Treasury decline to withdraw Reg. §1.707-5T(a)(2)(i), we recommend clarifying the meaning of the Proviso, which seems designed to preclude a partner from including in its share of partnership liabilities, for disguised sale purposes, any amount in excess of its share of the liability under Reg. §1.752-2 to the extent that the liability is a recourse liability under Section 752; however, the Proviso could be read to take into account the allocation of partnership nonrecourse liabilities under Reg. §1.752-3(a)(1) and (2) in determining the amount of a partnership liability excluded from Reg. §1.707-5T(a)(2)(i)).

With regard to the changes in T.D. 9787 (the "Final Regulations"),[7] we recommend clarifying the meaning of the phrase "in connection with" under Reg. §1.707-5(a)(6)(i)(E) regarding the additional type of qualified liability under the disguised sale regulations. While the changes made by the Final Regulations were generally positive, we believe this clarification would improve the administration and application of the disguised sale rule for both the IRS and taxpayers.

With regard to the proposed regulations issued on October 5, 2016 (the "2016 Proposed Regulations"), we recommend not adopting the proposed removal of Reg. §1.752-2(k) and maintaining the satisfaction presumption in Reg. §1.752-2(b)(6) by not adopting the proposed changes to paragraph (j) of Reg. §1.752-2.

[7] The changes made by T.D. 9787 related to §707 generally apply to any transaction for which all transfers occur on or after October 5, 2016, and the changes made by T.D. 9787 related to §752 generally apply to liabilities incurred by the partnership, that a partnership takes subject to, or that are assumed by the partnership on or after October 5, 2016. *See* Reg. §1.707-9(a)(1); Reg. §1.752-3(d).

I. Overview of Current Applicable Law

a. Disguised Sale Rules Under §707

We describe in this section of the comment letter the provisions of the §707 disguised sale rules relevant to our recommendations.

Section 707 provides that a transfer of property by a partner to the partnership, followed by a distribution by the partnership to the contributing partner, will be treated either as a transaction between the partnership and one who is not a partner or between two or more partners acting other than in their capacity as partners. Similarly, under Reg. §1.707-3, a transfer of property by a partner to a partnership followed by a transfer of cash or other consideration from the partnership to the partner will be treated as a sale of property by the partner to the partnership.

A deemed or actual distribution of money can be treated as consideration under the disguised sale rules. Generally, a partnership's assumption of a non-qualified liability (or taking property subject to a non-qualified liability) is treated as a transfer of consideration to the contributing partner to the extent the amount of the liability exceeds the contributing partner's share of such liability after the partnership assumes or takes property subject to the liability.[8]

The debt-financed distribution rule in Reg. §1.707-5(b) provides a limitation on the amount of a debt-financed distribution that can be treated as consideration. This exception provides that if a partner transfers property to a partnership, the partnership incurs a liability and all or a portion of the proceeds of that liability are traceable to a transfer of money or other consideration to the partner, the transfer of money or other consideration is taken into account for disguised sale purposes only to the extent that the amount of money or the fair market value of other consideration exceeds the partner's allocable share of the partnership liability.[9]

[8] Reg. §1.707-5(a)(1).
[9] Reg. §1.707-5(b)(1).

Reg. §1.707-5T(a)(2)(i), as adopted in the Temporary Regulations and revised, contains the rule for determining a partner's share of the relevant partnership liability for disguised sale purposes in the two situations above.

The disguised sale regulations contain special rules for liabilities known as qualified liabilities.[10] Generally, a partnership's assumption of a qualified liability, or a partnership's taking property subject to a qualified liability, in connection with a transfer of property by a partner to the partnership is not treated as part of a disguised sale.[11] Prior to the publication of the Final Regulations, there were four types of qualified liabilities. Such qualified liabilities include: a liability that was incurred more than two years before the transfer of property to the partnership that has encumbered the property throughout the two year period (Type A); a liability that was incurred within two years of the transfer of property to the partnership, but not in anticipation of the transfer to the partnership, and that has encumbered the transferred property since it was incurred (Type B); a liability allocable under Reg. §1.163-8T to capital expenditures with respect to the contributed property (Type C); and a liability incurred in the ordinary course of the trade or business in which property transferred to the partnership was used or held, but only if all the material assets related to the trade or business are transferred to the partnership (Type D).[12] Newly added is a liability that was not incurred in anticipation of the transfer of the property to a partnership, but was incurred in connection with a trade or business in which property transferred to the partnership was used or held, but only if all the assets related to that trade or business are transferred other than assets that are not material to a continuation of the trade or

[10] Reg. §1.707-5(a)(5)-(6).
[11] Due in part to the shifting of liabilities, both qualified and nonqualified, among partners, there could be situations where a partnership's assumption of (or taking property subject to) a qualified liability is treated as a transfer of consideration made pursuant to a sale due solely to the partnership's assumption of (or taking property subject to) a liability other than a qualified liability or a transfer of other consideration. *See* Reg. §1.707-5T(a)(2); §1.707-5(a)(5)(i). Therefore, under the new final regulations, where a partner transfers property to a partnership that is treated as a sale due solely to the partnership's assumption of (or taking property subject to) a liability other than a qualified liability, the partnership's assumption of (or taking property subject to) a qualified liability is not treated as a transfer of consideration if the total amount of all liabilities other than qualified liabilities that the partnership assumes (or takes subject to) is the lesser of 10% of the total amount of all qualified liabilities or $1,000,000. Reg. §1.707-5(a)(5)(iii).
[12] Reg. §1.707-5(a)(6)(i)(A)-(D).

business.[13] There is no encumbrance requirement for the newly added Reg. §1.707-5(a)(6)(i)(E) qualified liability ("E Qualified Liability").

b. Allocation of Partnership Liability Rules

As noted above, a partner's share of partnership liabilities is important in determining the extent to which the disguised sale rules could apply to deny non-recognition treatment to a contribution of property to a partnership.[14] In determining a partner's share of a partnership liability for disguised sale purposes, the previous regulations under §707 contained two separate rules based on whether the liability was recourse or nonrecourse. First, under former Reg. §1.707-5(a)(2)(i), a partner's share of a partnership's recourse liability equaled the partner's share of the liability under §752.[15] A partner's share of a recourse liability under §752 equaled the portion of that liability, if any, for which the partner or related person bears the economic risk of loss.[16] Under former Reg. §1.707-5(a)(2)(ii), a partner's share of a partnership's nonrecourse liability was determined by applying the same percentage used to determine the partner's share of excess nonrecourse liability under Reg. §1.752-3(a)(3).[17]

The Temporary Regulations changed the above liability allocation rules. In particular, Reg. §1.707-5T(a)(2)(i) provides that, for disguised sale purposes only, a partner's share of a liability of a partnership, whether recourse or nonrecourse, is determined by applying the same percentage used to determine the partner's share of the excess nonrecourse liability under Reg. §1.752-3(a)(3), subject to the Proviso, stating that "such share shall not exceed the partner's share of the partnership liability under section 752 and applicable regulations (as limited in the

[13] Reg. §1.707-5(a)(6)(i)(E).
[14] The disguised sale rules can also result in a partnership being treated as receiving consideration in certain circumstances, including from a change in the allocation of partnership liabilities, that could result in a disguised sale of property by the partnership to a partner. For purposes of this comment letter, we focus solely on the potential of a disguised sale by a partner to the partnership.
[15] A partnership liability is a recourse liability to the extent that a partner or related person bears the economic risk of loss for that liability. Reg. §1.752-1(a)(1).
[16] Reg. §1.752-2(a).
[17] A partnership liability is a nonrecourse liability to the extent that no partner or related person bears the economic risk of loss for that liability. Reg. §1.752-1(a)(2).

application of section 1.752-3(a)(3) to this paragraph (a)(2))."[18] For purposes of allocating excess nonrecourse liabilities, a partner's share of such partnership liabilities is determined in accordance with the partner's share of partnership profits, taking into account all facts and circumstances relating to the economic arrangement of the partners.[19]

The above indicates that whether a liability is a recourse liability or a nonrecourse liability under §752 is still relevant despite the changes in T.D. 9788 to the partnership liability allocation rules in Reg. §1.707-5(a)(2)(i). A liability is a recourse liability under §752 to the extent a partner or related person bears the economic risk of loss for that liability. In particular, a partner bears the economic risk of loss for a partnership liability to the extent the partner or related person would be obligated to make a payment if the partnership's assets became worthless and the liability became due and payable.[20] In determining the extent to which such a person has a payment obligation and the economic risk of loss, it is assumed that the person with a payment obligation will satisfy such obligations (the "Satisfaction Presumption"), irrespective of the person's net worth, subject to anti-abuse rules and certain net value rules that apply to disregarded entities.[21]

The Satisfaction Presumption has its limits. Under existing Reg. §1.752-2(k)(1), when determining the extent to which a partner bears the economic risk of loss for a partnership liability, an obligation of a business entity that is disregarded as an entity separate from its owner is taken into account only to the extent of the *net value* of the disregarded entity as of the allocation date that is allocated to the partnership liability. That is to say, the owner of a disregarded entity will be treated as bearing the economic risk of loss for a partnership liability only to the extent of that disregarded entity's net value. The "net value" of a disregarded entity is

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[18] Reg. §1.707-5T(a)(2)(i), applicable to any transaction with respect to which all transfers occur on or after January 3, 2017. The temporary regulation expires October 4, 2019. *See* Reg. §1.707-5T(g); Reg. §1.707-9T(a)(5).
[19] The significant item method, alternative method, and additional method described in Reg. §1.752-3(a)(3) for allocating excess nonrecourse liabilities do not apply for disguised sale purposes. Reg. §1.752-3(a)(3), applicable to all liabilities that are incurred, taken subject to, or assumed by a partnership on or after October 5, 2016, other than liabilities incurred, taken subject to, or assumed by a partnership pursuant to a written binding contract in effect prior to October 5, 2016. *See* §1.752-3(d).
[20] Reg. §1.752-2(b)(1). "Bottom dollar payment obligations" will not be recognized for purposes of determining who bears the economic risk of loss. Reg. §1.752-2T(b)(3).
[21] Reg. §1.752-2(b)(6). See Reg. §1.752-2(j)-(k).

the fair market value of all its assets less all its obligations that do not constitute Reg. §1.752-2(b)(1) payment obligations.[22] The 2016 Proposed Regulations propose to remove Reg. §1.752-2(k).

The anti-abuse rules in Reg. §1.752-2(j) attempt to address situations where partners enter into contracts to alter their economic risk of loss. Consequently, a payment obligation of a partner may be disregarded or treated as an obligation of another person if facts and circumstances indicate that a principal purpose of the arrangement is to eliminate the partner's economic risk of loss with respect to that obligation or create the appearance of the partner or related person bearing the economic risk of loss when, in fact, the substance of the arrangement is otherwise.[23] Also along the lines of limiting the Satisfaction Presumption, the 2016 Proposed Regulations contain a list of seven non-exclusive factors that may indicate a plan to circumvent or avoid the payment obligation, resulting in disregarding the payment obligation.[24] The seven factors are: (1) the partner (or related person) providing a payment obligation is not subject to commercially reasonable contractual restrictions that protect the likelihood of payment; (2) such partner (or related person) is not required to provide commercially reasonable documentation regarding its financial condition to the benefited party; (3) the payment obligation terminates at a specified time or is terminable by the provider, where events occur increasing the risk of loss to the guarantor or benefited party; (4) the primary obligor (or related person) holds money or other liquid assets in excess of the reasonably foreseeable needs of the primary obligor; (5) the payment obligation does not provide a timely remedy to the benefited party; (6) the payment obligation does not result in any substantial change to the terms of the liability; or (7) the creditor or other benefited party does not receive executed documents with respect to the payment

[22] Reg. §1.752-2(k)(2)(i).
[23] Reg. §1.752-2(j)(1) Similarly, to address situations where the principal purpose of the contractual arrangements *is* to be disregarded, such as a "bottom dollar payment obligation," the §752 Temporary Regulations include a rule that the Commissioner may apply to treat a partner with a bottom-dollar payment obligation as bearing the economic risk of loss for the partnership liability, regardless of any contractual arrangement with another partner or related person. Reg. §1.752-2T(j)(2)(i)(C)(2).
[24] Prop. Reg. §1.752-2(j)(3)(ii)(A)-(G).

obligation by a commercially reasonable period after the creation of the obligation.[25] The presence or absence of a factor is not indicative of whether a payment obligation is recognized or not. The determination is based on all the facts and circumstances at the time the partner or related person makes the payment obligation or, if the obligation is modified, at the time of the modification.[26] The 2016 Proposed Regulations provide that a plan to circumvent or avoid an obligation is deemed to exist if the facts and circumstances indicate that there is not a reasonable expectation that the payment obligor will have the ability to make the required payments if the payment obligations becomes due and payable.[27]

II. Recommendations

a. Temporary Regulation §1.707-5T(a)(2)(i) – Allocation of Partnership Liabilities

We understand that the rationale for the change made to the liability allocation rules was to tie the allocation of partnership profits to the allocation of the partnership liability under the belief that partnership profits would be used to repay the liability, indicating that the appropriate way to allocate the liability was based on the allocation of partnership profits. Such a rule is inconsistent with the Regulations in effect before the issuance of the Temporary Regulations and with the legislative history to the disguised sale regulations. Moreover, the rule was not proposed by the IRS and Treasury before its adoption in Reg. §1.707-5T(a)(2)(i). For these reasons, we recommend removing Reg. §1.707-5T(a)(2)(i), replacing it with the rules in effect before the adoption of the Temporary Regulations, and proposing any further changes to the partnership liability allocation rules for disguised sale purposes. Doing so would provide taxpayers and other stakeholders with the appropriate time and opportunity to comment on any change to the partnership liability allocation rules for disguised sale purposes.

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[25] Prop. Reg. §1.752-2(j)(3)(ii)(A)-(G).
[26] *Id.*
[27] Prop. Reg. §1.752-2(j)(3)(iii).

Reg. §1.707-5T(a)(2)(i) severely alters and restricts the manner in which a sponsor of a MLP will be able to contribute property to the MLP while continuing to finance its commercial activities. Prior to the amendment to the liability allocation rules, a sponsor would typically transfer property to its MLP in exchange for MLP units and money, with the money funded by a borrowing by the MLP on which the sponsor (or a related person) bore the economic risk of loss (often through a guarantee of the borrowing). The sponsor (or related person) in almost all instances supported bearing such economic risk of loss with assets other than its interests in the MLP. The sponsor would use the money proceeds to finance commercial activities such as repaying liabilities and acquiring or improving other property (generally related to natural resource activities).

We believe that the Temporary Regulations do not reflect the intent of Congress in enacting §707(a)(2)(B). Congress did not intend to treat borrowings against the partnership's assets and a related distribution as resulting in disguised sale consideration in all cases. The Conference Report relating to the disguised sale legislation in 1984 states:

> The conferees wish to note that when a partner of a partnership contributes property to the partnership and that property is borrowed against, pledged as collateral for a loan, or otherwise refinanced, and the proceeds of the loan are distributed to the contributing partner, there will be no disguised sale under the provision to the extent the contributing partner, in substance, retains liability for repayment of the borrowed amounts (i.e., to the extent the other partners have no direct or indirect risk of loss with respect to such amounts) since, in effect, the partner has simply borrowed through the partnership. However, to the extent the other partners directly or indirectly bear the risk of loss with

> respect to the borrowed amounts, this may constitute a payment to the contributing partner.[28]

The references to "risk of loss" in the above legislative history indicates that Congress intended to allow taxpayers to have the ability to borrow against partnership assets and receive a distribution of proceeds without running afoul of the disguised sale rules in a manner consistent with the initial final Regulations under §707(a)(2)(B). In that regard, the initial final Regulations under Section 707(a)(2)(B) (published in September 1991) implemented Congress's intent in enacting Section 707(a)(2)(B) by adopting, in former Reg. §1.707-5(a)(2), a partnership liability allocation rule that took into account the partners' economic risk of loss. Former Reg. §1.707-5(a)(2) and the debt-financed distribution rules of Reg. §1.707-5(b) reflected the intent of Congress in enacting §707(a)(2)(B) and, as described above, are a few of the provisions on which sponsors of MLPs have relied in facilitating the growth of the natural resource industry.

By ignoring a contributing partner's economic risk of loss in the partnership liability allocation determination, the amendment obviously creates a novel result and is a sea change from the manner in which partnership liabilities had been allocated for disguised sale purposes for over 25 years. The novelty of the amendment is apparent from the struggle practitioners are having in determining the meaning of the Proviso, which places a cap on the amount of the contributing partner's share of partnership liabilities for disguised sale purposes. At a minimum, if the IRS and Treasury choose to retain Reg. §1.707-5T(a)(2)(i), the IRS and Treasury should clarify the Proviso so that taxpayers can know how to comply with the rules. The text of Reg. §1.707-5T(a)(2)(i) is restated below, with the Proviso (or cap) in italics:

> For purposes of section 1.707-5, a partner's share of a liability of a partnership, as defined in section 1.752-1(a) (whether a recourse liability or a nonrecourse liability) is

[28] H.R. Rep. No. 98-861, at 862 (1984).

> determined by applying the same percentage used to determine the partner's share of the excess nonrecourse liability under section 1.752-3(a)(3) (as limited in its application to this paragraph (a)(2)), *but such share shall not exceed the partner's share of the partnership liability under section 752 and applicable regulations (as limited in the application of section 1.752-3(a)(3) to this paragraph (a)(2))*.

The Proviso's reference to "under section 752 and applicable regulations" could be read to mean that the partners' share of partnership nonrecourse liabilities under Reg. §1.752-3(a)(1) and (2) are relevant in determining the cap on the amount of a partnership liability that a partner can be allocated under Reg. §1.707-5T(a)(2)(i). We do not believe that was the intent of the Proviso, as published on November 17, 2016,[29] after the issuance of the Temporary Regulations.[30] Nonetheless, the literal wording of the Proviso creates uncertainty in the application of the allocation rule.

Moreover, the presence of the Proviso and its likely effect of limiting a contributing partner's share of partnership liabilities to take into account the allocation of the liabilities to other partners under the economic risk of loss rules of Reg. §1.752-2 is at direct odds with the stated rationale for the revised rules. In the preamble to the Temporary Regulations, the IRS and Treasury state that the intent to use the profit percentage allocation method is based on their belief that, in most cases, a partnership will satisfy its liabilities with partnership profits. This method, they say, more accurately reflects the economic arrangement of the partners.[31] In that case, it is not clear why another partner bearing the economic risk of loss should have any relevance under the

[29] FR Doc. 2016-27516 Filed: 11/16/2016 8:45 am; 81 Fed. Reg. 80,993 (Nov. 17, 2016).
[30] It is also not clear the extent to which the holding 3(a) of Rev. Rul. 95-41, 1995-1 CB 132, remains relevant. That holding states, "If the partnership determines the partners' interests in partnership profits based on all of the facts and circumstances relating to the economic arrangement of the partners, § 704(c) built-in gain that was not taken into account under § 1.752-3(a)(2) is one factor, but not the only factor, to be considered under § 1.752-3(a)(3)."
[31] Preamble to the Temporary Regulations.

revised allocation rule. The "heads-I-win, tails-you-lose" result of the Proviso thus supports its elimination.

The lack of a comment period for the revised allocation rule also supports the withdrawal of the rule. Generally, a notice of proposed rulemaking announces and explains the agency's plan to modify regulations or issue rules on matters not addressed in existing regulations. Additionally, it invites the public to comment on the suggested changes.

b. Regulation §1.707-5(a)(6)(i)(E) – New "E" Qualified Liability

In the Final Regulations, the IRS and Treasury added the new E Qualified Liability – one that was not incurred in anticipation of the transfer of the property to a partnership, but was incurred in connection with a trade or business in which property transferred to the partnership was used or held, but only if all the assets related to that trade or business are transferred other than assets that are not material to a continuation of the trade or business.[32] This newly added qualified liability appears to remove the encumbrance requirement for a liability incurred within two years of the property transfer, which was not in the ordinary course of the trade or business, but was nonetheless *in connection with* the trade or business. While we welcome the addition of the fifth type of liability that can be treated as a qualified liability, we recommend clarifying what "in connection with" a trade or business means for such purposes. For example, could a debt used to fund distributions to the owners of an operating trade or business be an E Qualified Liability? Or does the new E Qualified Liability rule cover only liabilities whose proceeds were used in the trade or business but were not trade payables (which are clearly covered by trade payable qualified liability category)?

[32] Reg. §1.707-5(a)(6)(i)(E).

While PLR 201714028, issued April 7, 2017, favorably addressed some of these issues, the letter ruling cannot be cited as precedent[33] and clarification is still needed on what "in connection with" means in this context.

c. Proposed Regulations Removal of Net Value Rule and Enhancement of Anti-Abuse Rule

As a general matter, the Satisfaction Presumption assumes that partners and related persons with a payment obligation will satisfy such obligation, without regard to their net worth.[34] The Satisfaction Presumption is limited by anti-abuse rules and certain "net value" rules that apply to disregarded entities.[35]

In the 2016 Proposed Regulations, the IRS and Treasury propose to eliminate the current net value rule and, in its place, enhance the role of the anti-abuse rule under Reg. §1.752-2(j). The net value rule for disregarded entities does not seem prone to abuse, and taxpayers and their advisors have grown accustomed to applying the net value rule. For that reason, we recommend retaining the net value rule.

We believe the Satisfaction Presumption continues to serve a valid role, as expressed by the New York State Bar Association in its 1990 report.[36] The 2016 Proposed Regulations contain rules that would severely curtail the efficacy of the Satisfaction Presumption, running counter to the goals achieved by its adoption in 1991.[37] In particular, the 2016 Proposed Regulations revise the anti-abuse rule in Reg. §1.752-2(j) by adding a rule stating that a plan to circumvent or avoid an obligation is deemed to exist if the facts and circumstances indicate that there is *not a reasonable expectation that the payment obligor will have the ability to make the required*

[33] §6110(k)(3).
[34] Reg. §1.752-2(b)(6).
[35] See Reg. §1.752-2(j)-(k).
[36] N.Y. St. B. Ass'n, Tax Sec., *Report on Simplification of Section 752 Regulations*, Rep. No. 640 (Jan. 18, 1990).
[37] T.D. 8380, 56 Fed. Reg. 66,348 (Dec. 23, 1991).

payments if the payment obligations becomes due and payable.[38] This language cuts against the Satisfaction Presumption that a person with a payment obligation is assumed to be able to satisfy such obligations, regardless of their actual net worth.

It would seem that the goals of the IRS and Treasury, by eliminating the net value rule and Satisfaction Presumption in favor of an enhanced anti-abuse rule, were to remove any undue expense and burden from taxpayers.[39] Retaining the Satisfaction Presumption would not detract from such goals. In that regard, we suggest that the IRS and Treasury retain the Satisfaction Presumption, not adopt the proposed change to Reg. §1.752-2(j), and add examples of situations which are viewed as abusive and thus, where the Satisfaction Presumption would not appropriately apply.

Sincerely,

Lori E. L. Ziebart
Executive Director
Master Limited Partnership Association

[38] Prop. Reg. §1.752-2(j)(3)(iii).
[39] Preamble to the 2016 Proposed Regulations.